United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,407

JERRY SUMMERLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

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ALAN KAY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant was found guilty upon an indictment charging him with robbery, assault with a dangerous weapon and carrying a dangerous weapon. The two complainants identified appellant as the bandit who assaulted them with a pistol and stole two attache cases containing money. Two other witnesses who were near the scene of the crime observed appellant running down the street carrying two attache cases. One of these witnesses saw appellant enter a white Ford automobile. Two other witnesses saw appellant transfer the two attache cases from the white Ford to a yellow Cadillac. Evidence presented by appellant indicated that he was home in bed at the time the crime was committed.

In view of the foregoing, the questions presented are as follows:

1. Whether the trial court, in the absence of objection, committed plain error by failing to instruct the jury that appellant was not required to prove his defense of alibi beyond a reasonable doubt.

2. Whether the trial court, committed plain error when in the course of his charge to the jury on the defense of alibi, initially made a minor mistake as to one phase of appellant's evidence, that was subsequently corrected:

   a. where no objection was made to the court's charge

   b. where appellant made no attempt to inform the court of the alleged mistake

3. Whether the trial court disparaged appellant's defense of alibi when he concluded his brief instruction on alibi by stating: "That is all that need be said about that":

   a. where the comment clearly meant that the instruction was simple and should be easily understood

   b. where no objection was taken to the trial court's comment

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4. Whether testimony by the complaining witnesses that appellant perpetrated the robberies with a nickel-plated revolver and struck one of the victims knocking him to the ground, sufficiently identified the weapon as a pistol within the meaning of the statute proscribing the carrying of a dangerous weapon.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed October 8, 1963, appellant was charged in five counts with; robbery (22 D.C. Code § 2901; two counts); assault with a dangerous weapon (22 D.C. Code, § 502, two counts); and carrying a dangerous weapon (22 D.C. Code § 3204).[1] Trial commenced on De-

[1] A co-defendant, James A. Garrett, was also charged in the five counts. At the conclusion of the Government's case-in-chief, defendant Garrett's motion for a judgment of acquittal as to all counts was granted (Tr. 570).

cember 9, 1963. On December 16, 1963, the jury returned a verdict of guilty on all counts. On January 20, 1964, appellant was sentenced to a term of imprisonment of from two (2) to seven (7) years. From the judgment and conviction entered below the appellant has perfected this appeal.

Evidence adduced by the Government

On July 28, 1963, at approximately 9:05 a.m., Ellis Levy, a co-owner of the Miles Sandwich Shops, located at 511 Morse Street, Northeast, went to his place of business for the purpose of opening the store for the day's trade (Tr. 23). Mr. Ellis Levy was accompanied by his 14 year-old nephew (Tr. 24). When he unlocked the front door, Ellis Levy was pushed violently from behind into the store and then spun around (Tr. 24). The bandit, later identified as appellant (Tr. 27-28), was facing him, wearing a stocking mask and carrying a nickel-plated revolver (Tr. 24). The assailant informed Ellis Levy that "this is a holdup, give me your money" (Tr. 24). Ellis Levy had in his hand an attache case containing $1800 that the assailant took from his hand (Tr. 24). The assailant then forced him and his nephew to face the wall (Tr. 25). Shortly thereafter Levy attempted to turn around and was struck from behind with the gun and knocked to the ground (Tr. 25). Within two or three minutes (Tr. 36), Ellis Levy heard the assailant say, "Get in there and give me your money" and then Ellis Levy's brother and co-owner of the Miles Sandwich Shops, Sidney Levy, entered the store (Tr. 26).

Sidney Levy was accosted when he arrived at the store at approximately 9:05 a.m. on July 28, 1963 (Tr. 55), and a nickel-plated revolver was pointed in his face (Tr. 56). When accosted and spun around, Sidney Levy dropped an attache case containing approximately $1300, that he was carrying, and the case was picked up by the assailant (Tr. 57). The co-owners were then forced to the back of the store (Tr. 26, 57). Although appellant's

face was covered with a woman's nylon stocking, both victims were able to ascertain appellant's facial characteristics (Tr. 39, 41, 58-59). Both victims subsequently identified appellant as the robber at a lineup held at the precinct station (Tr. 27, 46, 60), and made court room identifications of appellant (Tr. 28, 62).

Ted Anthony, who lives one block from the Miles Sandwich Shop (Tr. 64), was looking out of his open window at about five or ten minutes after 9:00 a.m. on July 28, 1963, when he saw appellant running down the street carrying two brown bags that looked like suitcases (Tr. 65). Appellant was met by another person at the corner of 6th Street and Florida Avenue, and appellant stated to his companion, "I got it, I got it" (Tr. 67, 70). At this time Anthony was about fifteen (15) feet from appellant (Tr. 69). He also saw appellant throw away a stocking cap (Tr. 70).

At approximately 8:45 or 9:00 a.m. on July 28, 1963, Charlie Collins was at the corner of 5th and M Streets, helping a friend push his automobile when he saw appellant and another person running down the street each carrying a brown brief case (Tr. 84). Appellant proceeded to a white Ford automobile, threw the case onto the back seat and then entered the front seat of the car (Tr. 85, 145). Appellant's companion, who was also carrying a suitcase, ran to a Pontiac automobile located in the middle of the block (Tr. 85). Both cars then left (Tr. 86). The witness Collins was a street width's distance from appellant and was able to get a good look at his face (Tr. 86). The events witnessed by Collins occurred approximately one and a half or two and a half blocks from the Miles Sandwich Shop (Tr. 89). Collins also noted that appellant walked with a peculiar gait (Tr. 117-118). He subsequently identified appellant at a lineup (Tr. 86-87), and during the trial (Tr. 82).

Mrs. Ruth Johnson and her daughter, Doris Johnson, testified that between 10:00 and 11:00 a.m. on July 28, 1963, they were looking out of their window (Tr. 148,

158), when they observed two cars, a "whitish looking" Ford and a yellow Cadillac, drive past their house into a Safeway parking lot (Tr. 149, 227). They identified the driver of the Cadillac as Garrett, the co-defendant, whom they had seen on prior occasions (Tr. 147, 226). The two cars were parked along side one another in the parking lot and appellant emerged from the Ford, reached into the back seat, removed two brown attache cases and placed them in the trunk of the Cadillac (Tr. 150, 227-228). Both cars then drove away leaving appellant, who proceeded to walk past their house (Tr. 152). Mrs. Johnson noted that appellant walked with a peculiar gait (Tr. 155). They later identified appellant at a lineup (Tr. 153, 229-230) and during trial (Tr. 150-151, 228-229).

Detective Jefferson testified that on July 29, 1963, he secured an arrest warrant for appellant's arrest (Tr. 291) and executed the warrant on September 2, 1963.

It was stipulated by counsel that appellant did not have a license to carry a gun (Tr. 321, 322).

Evidence adduced by appellant

Appellant's wife testified that she resided at 1530 - 28th Place, Southeast, with her husband and their two children (Tr. 596, 602). On July 28, 1963, she left for work around 9:00 a.m. and that when she left, appellant was still at home in his pajamas (Tr. 598). On cross-examination she testified that on July 27, 1963 and for six months prior thereto, appellant worked for his brother (Tr. 603) but on July 29, 1963, he decided to obtain other employment (Tr. 604). Appellant's brother, Ansell Summerlin, stated that he owned a white Ford convertible (Tr. 622) and that it was parked in front of his place of business at 9:00 a.m. on July 28, 1963 (Tr. 622). He admitted that occasionally appellant used his car (Tr. 623).

Eddie Anderson testified that he observed the white Ford convertible owned by appellant's brother, parked in

front of Ansell Summerlin's place of business on July 28, 1963, sometime between 9:00 and 10:00 a.m. (Tr. 617).

Appellant testified that he was home in bed on July 28, 1963, until 10:30 or 11:00 a.m. (Tr. 634). That later in the morning he obtained his brother's car and then picked up his wife (Tr. 635). In the evening he took his wife out to dinner, returned home and watched television (Tr. 636, 637). He stated that on Monday, July 29th, 1963, the day after the robbery, he obtained employment in Arlington, Virginia, and moved into a different house in Southeast Washington with a Mrs. Joan Perez (Tr. 641).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be pun-

> ished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I

Failure to note an objection to the trial court's instruction on the defense of alibi effectively precludes appellant from assigning error to the instruction in this Court. Rule 30, F. R. Crim. P. Moreover, even if timely objection had been made, the instruction given properly stated the law, viz. that an alibi defense means that the defendant claims he was not at the scene of the crime and therefore could not have committed it.

In the absence of a specific request the trial court is not obligated to inform the jury that an alibi defense does

not have to be proven beyond a reasonable doubt, where the trial court has adequately charged the jury that the government must prove the essential elements of each offense beyond a reasonable doubt.

The record fails to support appellant's contention that the trial court in the course of his charge to the jury emphasized salient points of the government's evidence and appellant is not entitled to have the trial court emphasize significant portions of his evidence.

Appellant's contention that one portion of the instruction on the defense of alibi was contrary to the evidence, usurped the function of the jury and constituted reversible error cannot be sustained in view of his failure to object to the instruction and his failure to advise the court of the mistake.

Appellant's contention that the trial court's statement at the conclusion of his brief instruction on alibi was disparaging, is utterly lacking in merit. At the conclusion of the instruction the trial court stated: "That is all that need be said about that." Clearly the comment was no more than a statement that the defense of alibi was not complex or difficult to understand, and was so interpreted by trial counsel who registered no objection.

II

The testimony of the two complainants that appellant pointed a nickel-plated revolver at them and the testimony of one of the complainants that he was struck by the pistol and knocked to the ground coupled with the stipulation that appellant did not have a license to carry a pistol was sufficient for the jury to find appellant guilty of carrying a dangerous weapon in violation of 22 D.C. Code § 3204.

ARGUMENT

I. The trial court's charge on the defense of alibi was sufficient, correct, and not objected to.

(See Tr. 441, 668-685)

In substance, appellant suggests two assignments of error in the trial court. The first three arguments relate to the trial court's allegedly erroneous instruction on his defense of alibi. The fourth and final argument relates to the sufficiency of the evidence to support his conviction on the fifth count of the indictment charging the offense of carrying a dangerous weapon.

Appellant's first assignment of error, that the trial court's instruction on the alibi defense was erroneous, is completely without merit.

A. *Appellant failed to note any objection to the trial court's charge to the jury*

At the outset we note that the record does not reflect that appellant proffered any instructions to the court upon his defense of alibi, nor did he object to the court's charge to the jury.[2] This without more, is sufficient to dispose of appellant's first three arguments. In the absence of objection, appellant is precluded from raising for the first time on appeal, alleged errors in the trial court's instructions. See Rule 30, F. R. Crim. P., *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); *Obery* v. *United States*, 95 U.S. App. D.C. 28, 217 F.2d 860 (1954), *cert. denied*, 349 U.S. 923 (1955).

Appellee well recognizes the salutary rule that this Court will notice plain error where erroneous instructions may result in a miscarriage of justice. *Barry* v. *United States*, 109 U.S. App. D.C. 301, 287 F.2d 340 (1961); *Williams* v. *United States*, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942), but to suggest that the instruction given

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[2] At trial appellant was represented by two experienced, retained trial counsel (Tr. 441).

herein resulted in a miscarriage of justice and should be noticed as "plain error", is fanciful.

B. *The instruction on alibi correctly stated the law*

Even assuming timely objection had been taken, appellant's contention cannot be sustained. The instruction on alibi sufficiently apprised the jury of appellant's defense and the general charge sufficiently impressed upon the jury that the burden of proof was upon the government.

The trial court instructed the jury that appellant's defense was alibi and defined "alibi" as meaning that appellant claimed he did not commit the crime and that he was not present at the scene of the offense. Viewing the instructions as a whole, nothing more was required. A defendant who interposes the defense of alibi attempts to prove that "he was not present at the time and place of the offense and hence could not have committed it." *Tomlinson* v. *United States*, 68 App. D.C. 106, 109, 93 F.2d 652 (1937), and an instruction that informs the jury that an "alibi" consists of proof that a defendant was elsewhere at the time the crime was committed and that it was therefore impossible for him to have committed it, is correct. *McCool* v. *United States*, 263 F. 55, 56 (6th Cir. 1920). The Supreme Court has held that since alibi evidence is merely rebuttal evidence directed to that part of the government's case that identifies the defendant and places him at the scene of the crime, the alibi defense may be adequately covered by general instructions that the government must prove the essential elements of the crimes charged, beyond a reasonable doubt, and no error is assignable in the absence of a specific instruction. *Goldsby* v. *United States*, 160 U.S. 70 (1895); *Witt* v. *State*, 265 Ind. 499, 185 N.E. 645 (1933).

Appellant cites two cases to support his contention that when the trial court instructs on alibi, the jury must be informed that alibi does not have to be proven beyond a reasonable doubt.[3] Without discussing the weight of those

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opinions in this jurisdiction, suffice it to say that in this Circuit, failure of the trial court to instruct that it was not appellant's burden to prove the defense of alibi beyond a reasonable doubt, is not error where the trial court gives complete instructions on reasonable doubt. *Guthrie* v. *United States*, 92 U.S. App. D.C. 361, 207 F.2d 19 (1953).[4]

Furthermore, if appellant believed that the instruction on alibi was erroneous, which we do not concede, then it was incumbent upon him to so inform the court. *Rucker* v. *United States*, 92 U.S. App. D.C. 336, 206 F.2d 464 (1953), and his failure to discharge that burden waives any alleged errors. *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951); *Mundy* v. *United States*, 85 U.S. App. D.C. 120, 176 F.2d 32 (1949).[5]

Appellee submits that viewing the charge as a whole,[6] the jury could not fail to understand that its task was to decide whether or not appellant was in fact the person who robbed the complaining witnesses. *Cf. Jones* v. *United States*, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962).

States v. *Marcus*, 166 F.2d 497, 504 fn.5 (3d Cir. 1948). In *Reavis* v. *United States*, 93 F.2d 307 (10th Cir. 1937), a specific instruction was requested and denied. The Tenth Circuit held that in view of the request, the denial was error. See also, *United States* v. *Barrasso*, 267 F.2d 908 (3d Cir. 1959); *Arnold* v. *United States*, 94 F.2d 499 (10th Cir. 1938); *United States* v. *Vigorito*, 67 F.2d 329 (2d Cir. 1933), *cert. denied*, 290 U.S. 705; Annot., 124 A.L.R. 471, § 11 b. and c. (1940).

[4] See also, *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 180 F.2d 397, *cert. denied*, 339 U.S. 987 (1950).

[5] See also, *United States* v. *Tramaglino*, 197 F.2d 928 (2d Cir. 1952), *cert. denied*, 344 U.S. 864; *Yoffe* v. *United States*, 153 F.2d 570 (1st Cir. 1946); *People* v. *Edwards*, 81 Cal. App. 2d 655, 185 P.2d 74 (1947).

[6] A prinicple, basic to appellate review, is that in reviewing alleged errors in instructions, the reviewing court will look to the whole charge and not isolated portions. See, *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961).

C. *The trial court neither emphasized the government's evidence nor disparaged appellant's defense*

Appellant reads the court's instructions as containing a summary of the "high points of the Government's narrative" (Appellant's Br. 23), thereby obligating the court to summarize appellant's evidence on alibi.[7] We do not so read the court's charge. Appellant recognizes that the trial court is not required to summarize the evidence. Similarly appellant cannot complain on appeal that the trial court failed to specifically marshall the evidence for and against him or that the trial court failed to give detailed instructions as to each item of the evidence relating to his defense. *United States* v. *Simmons*, 281 F.2d 354 (2nd Cir. 1959); *Travis* v. *United States*, 269 F.2d 928 (10th Cir. 1959); *United States* v. *Cindrich*, 241 F.2d 54 (3d Cir. 1957); *United States* v. *Schwartz*, 213 F. Supp. 306 (D.C.E.D. Pa. 1963), especially where no specific instruction was requested, *Barsky* v. *United States*, 83 U.S. App. D.C. 127, 167 F.2d 241, *cert. denied*, 334 U.S. 843 (1948). A review of the court's charge fails to support appellant's contention that the court's emphasized portions of the government's evidence. Indeed, the trial judge specifically informed the jury that he would not discuss the facts, "because to do so may possibly indicate some feeling on the part of the Court about the facts" (Tr. 669). The court did briefly refer to the evidence by way of illustrating the instruction on flight (Tr. 679-680).[8]

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[7] The cases relied upon by appellant are inapposite to the case at bar. In *Buchanan* v. *United States*, 244 F.2d 916 (6th Cir. 1957), the comments of the trial court were clearly in the nature of comments to the jury on the evidence; in *Davis* v. *United States*, 227 F.2d 568 (10th Cir. 1955), the court told the jury that in his opinion the defendant was guilty beyond a reasonable doubt; in *Boatright* v. *United States*, 105 F.2d 737 (8th Cir. 1939), the judge narrated material and significant facts adduced by the government and wove them into an argument that was clearly prejudicial. A review of the trial court's charge herein can lead to but one conclusion, that his comments were both dispassionate and impartial.

[8] Although it might be argued that the facts used to illustrate the probative value of "flight" could have been stated with more

Appellant's allegation that this brief reference highlighted the government's evidence is completely untenable.

Finally appellant suggests that the instruction on the defense of alibi misstated certain portions of his evidence and disparaged the defense. In the course of his charge to the jury on the alibi defense the court made a mistake as to one part of the defense testimony. The court initially stated that the appellant claimed that he was visiting his brother at the time the offense was commited and then corrected himself by stating that both appellant and his wife testified that he was at home when the crime was committed (Tr. 681). It is now argued that this constituted reversible error. Appellee submits that the misstatement is so patently harmless that discussion of the point is not warranted. Additionally, defense counsel made no effort to correct the misstatement either at the time that it was made or at the conclusion of the court's charge to the jury. In rejecting a similar contention this Court had occasion to state: "It is important in such circumstances that counsel act in time to give the judge an opportunity to correct an error made in the course of the charge to the jury." *Rucker* v. *United States*, *supra* at 337; *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951).

Appellant maintains that the trial court's statement at the end of the terse instruction on the defense of alibi was disparaging and "plain error". After briefly defining the word alibi, the trial court stated: "Alibi" simply means that, "I didn't do it, I was somewhere else." That is all that need be said about that." (Tr. 681) Clearly the last sentence uttered by the trial court merely informed the jury that the concept of "alibi" was both simple and uncomplicated and that greater explanation was not required.

To argue that such an innocuous statement partakes of some belittling or disparaging reference to the defense,

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clarity, appellant certainly cannot argue that this reference to the evidence placed greater emphasis on the government's evidence.

reflects a sensitivity that was not attached to the comment by trial counsel, and offends reason. Compare, *People* v. *Intersimone*, 42 N.Y.S. 2d 399, 266 App. Div. 280 (1943); *People* v. *De Martino*, 252 App. Div. 476, 299 N.Y.S. 781 (1937), and see generally cases cited in Annot. 146 A.L.R. 1377 (1943).

II. There was sufficient evidence to support the jury's verdict of guilty on Count V

(Tr. 24, 56, 292, 322)

Count V charged appellant with the offense of carrying a dangerous weapon, to wit, a pistol (22 D.C. Code § 3204). Appellant challenges the sufficiency of the government's evidence to support the jury verdict of guilty.

Appellant's contention that the government failed to establish that the pistol used by him was in fact a real weapon and not merely a toy pistol, is utterly lacking in merit. *Cf. United States* v. *Parker*, D.C. Mun. App. 185 A.2d 913 (1962). The victims of the iniquitous assault and robbery testified that appellant was carrying a nickel-plated revolver. Ellis Levy stated that appellant struck him with the pistol, from which blow he fell to the ground (Tr. 25). Sidney Levy testified that appellant held a nickel-plated revolver in his face (Tr. 56). Appellant stipulated that on July 28, 1963, he did not have a license to carry a pistol (Tr. 322). No pistol was introduced into evidence. Appellant was arrested approximately one month after the crimes were committed (Tr. 292).

Appellee submits that the evidence tending to show that appellant used a pistol to perpetrate his nefarious crimes was clearly sufficient to establish a *prima facie* case that appellant violated 22 D.C. Code § 3204. Introduction of the pistol into evidence is not a prerequisite to a conviction under the statute.[9] Whether or not appellant was carrying a pistol on July 28, 1963, was a question of fact

[9] See 68 C.J. *Weapons* § 60 c. n. 11 (1934).

for the jury.[10] Compare *Tatum* v. *United States*, D.C. Mun. App. 88 A.2d 495 (1952). Similarly, whether or not an accused had the requisite intent to commit the proscribed act and whether or not, in the absence of a stipulation, an accused possessed a license to carry the pistol are also questions of fact to be resolved by the jury. *Bussie* v. *United States*, D.C. Mun. App. 81 A.2d 247 (1951). Thus if the jury found, and the verdict so indicates, that appellant committed the robberies and the assaults, then they could find from the evidence that he was carrying a pistol in violation of 22 D.C. Code § 3204.

Moreover, it is to be noted that appellant must prevail on his first assignment of error to secure reversal. If his challenge to the instruction on alibi fails, the sentence must still be sustained since the sentence imposed was a general sentence and not greater than the maximum which could have been imposed on either of the first four counts. *Kosmos* v. *United States*, 111 U.S. App. D.C. 234, 296 F.2d 356 (1961); *Monroe* v. *United States*, 98 U.S. App. D.C. 228, 234 F.2d 49, *cert. denied*, 352 U.S. 873 (1956).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
ALAN KAY,
Assistant United States Attorneys.

[10] *Compare, Couch* v. *Commonwealth*, Ky., 255 S.W. 2d 478 (1953), where the court held that proving the weapon was defective is an affirmative defense.

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,407

JERRY G. SUMMERLIN,

Appellant

V.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the trial court, after discussing salient points in the prosecution's robbery case, misled the jury and degraded the sole defense of alibi by erroneously stating that defendant relied upon a different alibi than the one actually relied upon, and then confusingly stating the correct alibi, but worded as though the testimony of the various defense witnesses was in conflict.

II. Whether the trial court erred in failing to instruct the jury concerning burdens of proof, that although the prosecution must prove its case beyond a reasonable doubt, the defendant's alibi need only be sufficient to raise a reasonable doubt of guilt.

III. Whether, in absence of objections to the instructions during the trial the Court of Appeals will find reviewable the erroneous statement of the alibi, and the failure to instruct concerning necessary degrees of proofs of prosecution's and defense's cases, as constituting "plain error" prejudicing jury consideration of the alibi.

IV. Whether the conviction of carrying a pistol without a license under 22 DCC §3204 can be sustained where the pistol was not recovered and no evidence indicated it was a real firearm.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,407

JERRY G. SUMMERLIN,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Jerry G. Summerlin, appeals from a judgment of conviction entered by the United States District Court for the District of Columbia on January 20, 1964, after a jury trial on December 9-16, 1963. The jury found the appellant guilty of two counts of armed robbery, in violation of D.C. Code §22-2901,

two counts of assault with a dangerous weapon in violation of D.C. Code §22-502, and one count of carrying a pistol without a license in violation of D.C. Code §22-3204.

On January 28, 1964 the trial judge authorized appellant to proceed on appeal without payment of costs.

Jurisdiction of this court rests on 28 U.S.C.§1291.

STATEMENT OF THE CASE

The appellant, Jerry G. Summerlin was convicted by a verdict of the jury (Tr. 685) of two counts of armed robbery, two counts of assault with a dangerous weapon, and one count of carrying a pistol without a license (Tr. 16, 17), relating to offenses alleged to have taken place July 28, 1963 at the Miles Sandwich Shop, 511 Morse Street, N.E., in the District of Columbia around 9:00 A.M. (Sunday). The case presented by the Government included testimony of the robbery victims, Ellis and Sidney Levy, and other witnesses who testified to being in the general vicinity of the scene of the crime, the latter witnesses having testified that they saw Summerlin running with two attache cases alleged

to contain the stolen money, and to have seen him driving off in a white Ford convertible, and later meeting with co-defendant Garrett (Tr. 147) who drove a yellow Cadillac into which the attache cases were placed during a brief stop on a Safeway parking lot.

Chronologically, the Levy brothers, Sidney and Ellis, are owners of the Miles Sandwich Shop, and had both gone there around 9:05 A.M. on that Sunday morning (Tr. 24), each carrying with him a tan attache case, the cash assets of the Miles Sandwich Shop being divided between the attache cases and amounting to approximately $3000.00 (Tr. 24, 57). Ellis Levy arrived at the shop first, and while opening the door with his key, a White man grabbed him and pushed him into the Shop and made him face the wall. The robber grabbed Ellis Levy's attache case and apparently waited the arrival of Sidney Levy (Tr. 25). Ellis Levy got a quick look at the robber (Tr. 41) who wore a nylon stocking (Tr. 58) mask pulled over his head to distort and obscure his features, and Ellis Levy testified that the robber had a pistol with which he threatened him. Just before Sidney Levy arrived with his attache case containing the rest

of the cash assets, Ellis Levy started to turn around thinking perhaps the robber had gone, but he was still there and struck him on the head (Tr. 25) presumably with the pistol and knocked him to the floor. Sidney Levy then arrived, and the robber pushed him inside (Tr. 56) and took his attache case and contents from him, and then made both of the Levy brothers, and a young nephew who had come in with Ellis Levy go into the rear of the Shop (Tr. 57) and stand in a corner behind a refrigerator (Tr.58). The robber then escaped with the two attache cases, and the Levy brothers called the police who arrived a few minutes later. Sidney Levy was unable to identify the appellant at all as the robber (Tr. 63) but said the robber wore a suntan or khaki colored shirt (Tr. 59), and Ellis Levy identified him only with considerable uncertainty (Tr. 31).

The Government witness Anthony identified Summerlin (Tr.60) after a first unsuccessful attempt looking at pictures (Tr. 286), and stated that the appellant was the person who ran (Tr. 65) past his house about a block (Tr. 64) from the Sandwich Shop carrying two attache cases. He said that the appellant joined another man who looked like a brother (Tr. 68), and they ran off together.

Another witness Collins testified that he was several blocks from the Sandwich Shop and saw a White man whom he identified (Tr. 126) as Summerlin (Tr. 83) running down the street with an unidentified man, each carrying an attache case. The unidentified man got into a red and white (Tr. 134) parked Pontiac (Tr. 84) and drove off, and the witness testified that appellant with his attache case crossed the street in front of the witness and got into a waiting white Ford (Tr. 85) automobile which was "just an ordinary ... plain car" (Tr. 85) driven by a Negro (Tr. 86) and then drove off. He further testified that Summerlin did not wear a khaki shirt (Tr. 133) but that he wore a "polkadot" (colored stripes) shirt (Tr.113).

Two witnesses, a mother and daughter, by the name of Johnson, testified that they lived some distance further from the Miles Sandwich Shop, and that about 10:00 or 11:00 A.M. (Tr. 148,227) they saw a yellow Cadillac (Tr. 149) driven by defendant Garrett drive into a Safeway lot (Tr. 148) next to their house and stop and then a white Ford entered with two White men (Tr. 151) and stopped next to the Cadillac. The Negro defendant Garrett got out of the Cadillac, opened the trunk, and a White man got out of the Ford and put two attache cases (Tr. 189) into the trunk which was then closed (Tr. 150). For some unspecified reason, the White man walked with a peculiar gait (Tr. 214) up the block past

their house, and they identified him as Summerlin (Tr. 151, 230). The testimony of Mrs. Ruth Johnson and daughter Doris Ann Johnson was quite confused as to detail regarding color of the Cadillac (Tr. 149, 455, 493), make of the Ford (Tr. 479), how many men came in and left in the Ford (Tr. 151, 155, 227, 233), and which car the various men left in (Tr. 152, 231), which car left the lot first (Tr. 261). Mrs. Johnson stated that Summerlin never came back to the lot (Tr. 217), but Doris Ann Johnson testified that he came back (Tr. 235) and drove off in the white Ford which followed the yellow Cadillac. The trial judge summed up numerous other inconsistencies in Mrs. Johnson's testimony during a later impeachment attempt (Tr. 462, 491, 492).

Later the same day, the police stopped Garrett and the yellow Cadillac (Tr. 282), but Garrett jumped out of the car and escaped, although he turned himself in shortly thereafter (Tr.291). The yellow Cadillac was searched but no attache case or money was found (Tr. 297, 298). Summerlin was arrested on September 2,1963, although the police had previously picked up his brother Ansell (Tr. 359) in front of the appellant's home, while driving a white Ford convertible owned by Ansell. The witness Doris Ann Johnson testified that there were no distinguishing marks on the Ford (Tr. 261) which she saw drive out of the Safeway parking lot

past her window. The defendant Summerlin was placed in a police lineup (Tr. 500) with four detectives wearing white shirts (his was tan colored), and at various times during the day of September 2nd, he was identified by the witnesses: Anthony, Collins, Mrs. Ruth Johnson, Doris Ann Johnson, and Ellis Levy. Neither the attache cases nor the money was ever recovered.

The defendant Garrett was dismissed (Tr. 570) because no evidence was introduced which would place him at the scene of the robbery, and therefore the robbery counts could not be supported. The jury was not told why Garrett disappeared from the trial, but merely that the judge had removed him from their consideration, and they should not speculate why he was removed (Tr. 583). The later instructions to the jury stated that no inference should be drawn in connection with the defendant Summerlin by the removal of Garrett (Tr. 675, 676).

Neither the attache cases, the money, nor the pistol were ever recovered.

In brief, this is the narrative of the case put on by the U.S. attorney.

The case put on by the defendant (Tr. 591) amounts to a totally different narrative in which only the time of occurrence

corresponds with the prosecution's narrative, all other facts being different. The defendant's case shows that the defendant was in possession of his brother Ansell's car, a white convertible Ford, on the night before the robbery, July 27th. The defendant took the car back and returned it to his brother who lives some distance from him on the evening before the robbery, and then went home to his wife (Tr. 608). They retired late that evening (Tr. 600) and she arose to go to work Sunday morning, and when she left their home it was just about 9:00 A.M. (Tr. 602) and the defendant was still in bed.

The brother Ansell Summerlin, testified that Sunday morning he drove the white Ford convertible to his place of business, arriving at 8:45 A.M. (Tr. 622) at his restaurant in Northeast Washington, about three and one-half miles from brother Ansell's home, and that he parked the car in front of his restaurant where it remained until about 12 Noon on that Sunday.

There was a corroborating witness, Eddie Anderson, who lived near Ansell Summerlin's restaurant (Tr. 613), and who testified that he took his wife to church on that Sunday morning at just about 9:00 (Tr. 618). He testified that the white Ford convertible was in front of the restaurant at that time.

Juanita Summerlin, Ansell Summerlin, and Eddie Anderson testified that the car was identifiable (Tr. 606, 621, 619) by an 18 inch dent in the right side door, and a crack about 6 or 7 inches long on the windshield.

The two narratives were presented to the jury, and the jury found against the defendant Summerlin.

The transcript of the record (Tr. 573, 574, and 575) includes a summary by the Trial judge, which recognizes the fact that the victims of the robbery, the Levy brothers, were unable to positively identify the robber and that since their identification was less than positive, and that since the other testimony does not include any testimony that anyone saw Summerlin leave the scene itself of the robbery, the case submitted against the appellant was really a circumstantial evidence case. The sole defense offered in behalf of the appellant was his alibi, testified to by himself, and his wife, and further substantiated by the testimony of his brother Ansell and Eddie Anderson to the fact that he did not even have possession of the white convertible. The fact that this was his only defense is relied upon later in the arguments as showing prejudicial error because of the nature of a portion of the instructions to the jury

appearing in the transcript at page Tr. 679, 680 and 681. While instructing the jury, the trial judge met the basic requirements, of explaining the elements of the crime, the presumption of innocence, and the concept of reasonable doubt, he then provided a brief narrative of high points of the evidence presented in behalf of the Government beginning at line 7 on page Tr. 679 and ending in the middle of page Tr. 680. However, the Court made no mention of the case presented by the defense as an alibi, and gave no instructions to the jury as to the meaning of an alibi, or the extent to which it would have to be shown in order to raise a "reasonable doubt". At this point, the prosecuting attorney reminded the judge that there had been no instruction relating to the alibi, and the judge at line 7 on (Tr. 681) delivered a further instruction ending 12 lines later on (Tr. 681). This further instruction included a factual error because the judge instructed the jury that the defendant's defense to the case was that he was not at the scene of the robbery, "but on the contrary, <u>was visiting his brother at the time</u>". This error makes it appear that there was an inconsistency among the various witnesses who testified in behalf of the defendant, because the court having stated that the

defendant's defense was that "he was visiting his brother at the time" went on to state that his wife said that he was still in bed when she left, and finally the court went on to say that he said he was in bed at the time this robbery occurred. In this way, the jury, not having a transcript of the record before them, could easily conclude that the defendant was at his brother's place where the white convertible Ford was located, or that one of the witnesses in behalf of the defense had been lying, or at least there had been an inconsistency. There are undoubtedly other possible conclusions, but the court further compounded the error by ending this brief and erroneous narrative of the defendant's sole defense by summarily dismissing the subject, by stating "that is all that need be said about that". No exception was taken, and the trial court did not inform the jury that although the prosecution is required to prove its case beyond a reasonable doubt in order to sustain a conviction, the defendant need only prove his alibi to such an extent as to cast a reasonable doubt upon the prosecution's case, and thereby be sufficient to support a verdict of "innocent".

STATUTES INVOLVED

The statutes involved are D. C. Code §22-502, 2901, 3204.

§22-2901 - Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another person anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years, (March 3, 1901, 31 Stat. 1322, ch. 854, §810.)

§22-502 - Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (31 Stat. 1321, §804)

§22-3204 - No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in §22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465 §4; Nov. 4, 1943, 57 Stat. 586, ch. 296, Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, §204(c).)

STATEMENT OF POINTS

I. The trial court, after discussing salient points in the prosecution's robbery case, misled the jury and degraded the sole defense of alibi by erroneously stating that defendant relied

upon a different alibi than the one actually relied upon, and then confusingly stating the correct alibi, but worded as though the testimony of the various defense witnesses was in conflict.

II. The trial court erred in failing to instruct the jury concerning burdens of proof, that although the prosecution must prove its case beyond a reasonable doubt, the defendant's alibi need only be sufficient to raise a reasonable doubt of guilt.

III. In absence of objections to the instructions during the trial, the Court of Appeals should find reviewable the erroneous statement of the alibi, and the failure to instruct concerning necessary degrees of proofs of prosecution's and defense's cases, as constituting "plain error" prejudicing jury consideration of the alibi.

IV. The conviction of carrying a pistol without a license under 22 D.C.C. §3204 should not be sustained where the pistol was not recovered and no evidence indicated it was a real firearm.

SUMMARY OF ARGUMENTS

I. The trial court, while instructing the jury after summing up the salient points of the Government's circumstantial robbery case, stated the facts relied upon to establish the defense of alibi entirely incorrectly, alleging facts that had no basis in the testimony, and thereby confused and misled the jury by making it appear that there was conflict in the defense testimony, thus disparaging and prejudicing the sole defense.

1. The Government's case and the defendant's alibi constituted totally separate narratives, each uncontroverted by the other, the only question being which narrative the defendant actually participated in.

2. The confusion cast on the defense by the erroneous statement of the alibi was prejudicial and reversible error:

(a) Prejudiced the very heart of the only defense.

(b) The error was adequate to mislead the jury.

(c) The error at least made the defense testimony seem inconsistent, thereby disparaging its quality.

(d) If the error had not occurred, the results of the trial might well have been reversed.

3. The only paragraph (Tr. 681) in the instructions relating to alibi had a strong tendency to disparage this sole defense.

(a) The Court completely forgot to mention the defense or the alibi at all until reminded by the U.S. Attorney.

(b) When reminded, the Court stated the alibi completely erroneously and then followed it by a badly worded alternative statement which added to the confusion.

(c) The court then concluded this very brief statement by an impatient dismissal of the alibi: "That is all that need be said about that.", thereby attaching little significance to the defense.

(d) The court touched on the salient points of the prosecution's case, but failed to mention the second most important allegation of the defense, that the defendant was not in possession of the car at all at the time of the crime.

(e) The court failed to instruct the jury that the prosecution must prove its case beyond a reasonable doubt, but that the defense need only prove to the extent of raising a reasonable doubt.

II. The trial court erred prejudicially in failing to instruct the jury not to use the same standard in weighing the alibi which need only raise a reasonable doubt, as used when weighing the

Government's case which must be sustained beyond a reasonable doubt, and thereby left the jury to evaluate the testimony by a mere preponderance.

III. Although no objections were made at the trial, the Court of Appeals should review the alleged errors I and II on the basis that they are "plain errors" vital to a just verdict.

1. The erroneous statement of the alibi went to the heart of the sole defense and was an error of commission which when accepted by the jury necessarily brings about a false interpretation of the defense, placing the defendant at his brother's place with the white Ford, instead of at home in bed and out of possession of the car.

2. The jury probably accepted the judge's mis-statement and his attendant and apparent impatience with the whole subject of alibi.

3. The failure to provide a yardstick by which to distinguish the relative degrees of proof required of the prosecution and of the defendant left the jury free to decide the case by a mere preponderance, or to evaluate the alibi on the basis that it, too, must be proven beyond a reasonable doubt.

IV. The conviction of carrying a pistol without a license in violation of 22 D.C.C. §3204 cannot be sustained in the absence of any evidence at all from which the jury could have found that the alleged pistol was a real firearm.

ARGUMENTS

I. The trial court, after discussing salient points in the prosecution's robbery case, misled the jury and degraded the sole defense of alibi by erroneously stating that defendant relied upon a different alibi than the one actually relied upon, and then confusingly stating the correct alibi, but worded as though the testimony of the various defense witnesses was in conflict.

This is a case in which two completely separate and distinct narratives were presented to the jury, and in which there was no conflict between the narrative presented by one party and the narrative presented by the other party except the question of whether the defendant Summerlin and the white Ford convertible owned by his brother Ansell belonged in one narrative or in the other. The identification by the Levy brothers was less than positive (Tr. 407, 409, 573). The identification by the witness Anthony nearest the scene of the crime was only made after a second trip and attempt at headquarters (Tr. 286).

No one saw the defendant leave the scene of the crime, and therefore the Government's case is circumstantial at best.

Only one defense was presented, and this sole defense was an alibi growing out of the testimony of four witnesses, including the defendant (Tr. 634) and his wife (Tr. 598) to the effect that the defendant was at home in bed at the time the crime was committed, and that he was not in possession (Tr. 633, 618) of his brother's white Ford which was some miles away at his brother's restaurant. The location of the car was strongly corroborated by the disinterested witness Anderson (Tr. 618).

In connection with Point I, the appellant desires the court to read: (Tr. 573-6) - Summing up the Government's case;
(Tr. 597-599) - Mrs. Summerlin's testimony;
(Tr. 621-623) - Brother Ansell's testimony;
(Tr. 617-621) - Corroboration by Anderson; and
(Tr. 679-681) - Exerpt from Jury Instructions.

However, in instructing the jury, the trial court erroneously said (Tr. 681) "The defendant's defense to the case is, of course, that he is not guilty, that he didn't do it, he wasn't there, but, on the contrary, was visiting his brother at the time." (Emphasis added) The only alibi in evidence was that the defendant was home in bed at the time.

Counsel strongly urges that this damage done to the defendant's sole defense during instruction of the jury raises a strong presumption that the error was prejudicial because such error confuses and thereby weakens the only defense. As a matter of fact, the entire narrative told by the witnesses testifying in behalf of the defendant was fully consistent, and the testimony of no defense witness was in conflict with the testimony of any other defense witness.

Tests employed to determine the difference between harmless error and reversible error are met as follows:

(1) The error was prejudicial to the sole defense.

(2) The error was entirely adequate to mislead the jury who would, before verdict, be unable to review a transcript of the testimony in detail to determine that the error was actually a mis-statement on the part of the court. Being without means

to determine whether the mis-statement of fact was error or not, the jury probably accepted the judge's statement as true.

(3) The error goes to the very heart of the only defense because it confuses the alibi, thereby casting doubt upon the consistency of the testimony adduced in behalf of the defendant, and thus down-grading the quality of the only defense presented.

(4) If the error had not occurred, there is surely a likelihood that the jury might have found the alibi sufficient to raise a reasonable doubt, and therefore the verdict might easily have been reversed. In McFarland v. United States, 174 F. 2d. 538, 85 U.S. App. D.C. 19, (1949), the court stated:

> "If a charge to a jury, considered in its entirety, correctly states the law, the incorrectness of one paragraph or one phrase standing alone ordinarily does not constitute reversible error; but it is otherwise if two instructions are in direct conflict and one is clearly prejudicial, for the jury might have followed the erroneous instruction. Nicola v. United States, 3 Cir., 1934, 72 F. 2d. 780, 787; Drossos v. United States, 8 Circ., 1924, 2 F. 2d. 538, 539. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."; Bollenbach v. United States, 1946, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

Many courts have held that the effect of the jury instructions as a whole should be considered in determining the nature

of an alleged error. Beck v. United States, 317 F.2d. 865, C.C.A.-5th, (1963; Roberts v. United States, 284 F. 2d. 209, 109 U.S. App. D. C. 75 (1960). In Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698 (1933) the court stated:

> "This privilege, however, does not permit the judge to distort or add to the evidence; and, because of his great influence on the jury, he must use great care to be fair and not mislead, and must studiously avoid deductions and theories not warranted by evidence. P.470".

It is the position of the appellant that when such a consideration is made by comparing the court's summary of the Government's high points, which reads as follows:

> "Now, the only comment that I have on the evidence -- and I have this only because it is necessary to illustrate a principle of law -- has to do with the testimony which alleges that the defendant Summerlin was seen running with an attache case in his hand that Sunday morning in the neighborhood of 511 Morse Street, Northeast. And the principle of law is that a defendant's flight from the scene of a crime may be considered by the jury in connection with other circumstances of the case as showing a consciousness of guilt.
>
> "No witness places Summerlin in the immediate vicinity of the scene of the crime, namely , 511 Morse Street; but some witnesses have placed him -- say they saw him -- in the neighborhood, the fairly immediate neighborhood. Fifth and M Streets, for example, is -- I have forgotten exactly how far -- but close to 511 Morse Street, Morse being

> North of M. The witness Collins who was standing at Fifth and M said that he saw him running either from -- that is the wrong diagram for my purposes -- whatever the street North of M is, either running from that street down Fifth or from an alley immediately below the street north of M down Fifth Street. And the witness Anthony who lives in the 500 block of Florida -- I think Florida Avenue is the street immediately north or south, it doesn't matter -- he says that is about a block and a half, depending on which way you go. He saw him running from the direction at least and in the fairly immediate neighborhood of 511 Morse Street. That may be considered by you, if you care to do so, as evidence, -- I means as showing a consciousness of guilt when you consider it with all of the other testimony in the case."

with the court's summation of the defense's alibi which reads as follows:

> "Counsel, of course, have argued -- well, I will. The defendant's defense to the case is , of course, that he is not guilty, that he didn't do it, he wasn't there, but, on the contrary, was visiting his brother at the time. And the other witnesses for him, his brother, -- well, his wife said that when she left, he was still there. And he said that he was in bed at the time this robbery occurred. And that is what is called "alibi." "Alibi" simply means that "I didn't do it, I was somewhere else." That is all that need be said about that."

it clearly appears that there is a confusion and disparagement, minimizing the alibi for the following reasons:

(1) The court completely forgot to mention the alibi or any defense at all (Tr. 681).

(2) When reminded, he described it very briefly, introduced a clearly erroneous statement of fact which threw the defendant's narrative into confusion, and then stated the correct alibi in a way that made it seem as though different witnesses in behalf of defendant had told different stories.

(3) He then concluded this confused statement by an impatient dismissal of the whole subject of the alibi, saying: "That is all that need be said about that.", thereby appearing to attach little importance to this sole ground of defense.

(4) The judge did not mention as part of the alibi the testimony to the effect that brother Ansell was actually in possession of the white Ford and had parked it some distance removed from the crime at the time of the crime, this being the second most important fact in the defense case since it would support the alibi while divorcing the white Ford owned by Ansell both from the crime and also from the defendant's possession and control. Counsel does not suggest that a trial judge is under any duty to sum up the testimony at all, but does strongly urge that when the judge does in fact summarize the high points of the Government's narrative, he thereby obligates himself, in all fairness, to summarize the high points

of the defendant's narrative to an approximately equal degree, and certainly without error in quoting the material facts testified to, and especially the crucial point of the alibi itself, namely the defendant's alleged whereabouts. Cases supporting this general proposition include: Buchanan v. United States, 244 F. 2d. 916, CCA-6th (1957); Davis v. United States, 227 F. 2d. 568, CCA - 10th (1955); Boatright v. United States, 105 F. 2d. 737, CCA - 8th (1939); Minner v. United States, 57 F. 2d. 506, CCA - 10th - (1932); and Cline v. United States, 20 F. 2d. 494, CCA - 8th (1927), wherein the court stated:

> "Court, feeling duty to review facts for purpose of aiding jury in correct understanding, must do so in fairness to both litigants, and may not state facts on one side of issue only."

(5) The court failed to instruct the jury that although the prosecution must prove its case beyond a reasonable doubt, the defense's alibi is sufficient if it only raises a reasonable doubt, whereby the jury probably concluded that both narratives should be judged by the same standards of sufficiency, thus reducing the test to a mere preponderance of evidence.

II. The trial court erred in failing to instruct the jury concerning burdens of proof, that although the prosecution must prove its case beyond a reasonable doubt, the defendant's alibi need only be sufficient to raise a reasonable doubt of guilt.

Event without a request on the part of the counsel, the defendant has a right to have thejjury instructed that the defendant does not have to prove his alibi, but that it need only be sufficient to raise a reasonable doubt, United States v. Panchella, 41 F. Supp. 850, District Ct. E.D. Penna., (1941) the court stated that:

> "In Jordan case it was said at page 446, of 328 Pa., page 13 of 196 A.: "It is equally well settled that, where an alibi deference is presented, a failure, even in the absence of a specific request, to instruct the jury as to the degree of persuasion required is reversible error, for the reason that the jury is not furnished with a standard for determining the legal value of the evidence. 'The defendant had a right, even though no request was made for the instruction, to have the jury fully advised as to the difference between the burden resting upon the commonwealth to establish guilt, and that resting on the defendant with respect to the alibi set up'."

This point was approved in the case of Reavis v. United States, 93 F. 2d. 307, CCA - 10th (1937). In the absence of jury instruction on this point, it would be logical for a jury to assume that the two different narratives, made respectively in behalf of the Government and in behalf of the defendant,

occupy equal footing before the jury, to the extent that the same measure could be used in evaluating both factual narratives.

This would be a prejudicial assumption because the prosecution must prove its case beyond a reasonable doubt in order to succeed, whereas the defense need only present sufficient evidence supporting an alibi to raise a reasonable doubt as to guilt. It is obviously improper for the jury to select as true the prosecution's narrative over the alibi narrative by a mere preponderance in a criminal case, and it is therefore a prejudicial error to send the case to the jury without instructing them on this point which is vital to a correct verdict.

In connection with Point II, the entire jury instruction includes (Tr.668-685), the only reference to alibi appearing on (Tr. 681)

III. In the absence of objections to the instructions during the trial, the Court of Appeals should find reviewable the erroneous statement of the alibi, and the failure to instruct concerning necessary degrees of proofs of prosecution's and defense's c cases, as constituting "plain error" prejudicing jury consideration of the alibi.

No exceptions were taken to the above-discussed errors by the defense. In bringing this appeal, counsel is aware that a Court of Appeals ordinarily confines review of alleged error to points promptly objected to at the trial. However, there is an important exception to this general rule, namely the exception made to permit review of a "plain error" which goes to a basic issue and makes it likely that the result of the trial may have been affected by the error.

> "Plain error is error possessing clear capacity to bring about unjust result", State v. Williams, 189 A 2d 193, Supreme Court of New Jersey (1963).

Other cases approving review where no exception has been taken include Barry v. United States, 287 F. 2d. 340, 109 U.S. App. D.C. 301 (1961); United States v. Millpax, Inc., 313 F. 2d. 152, CCA-7th (1963); Brown v. United States, 314 F. 2d. 293, CCA - 9th, (1963); Silber v. United States, 82 S. Ct. 1287, 370 U.S. 717 (1962; Durham v. United States, 99 U.S. App. D.C. 132, 237 F. 2d. 760 (1956); and Harris v. United States, 112 U.S. App. D. C. 100, 299 F. 2d. 931 (1962).

In the present case, the first error casts doubt and confusion upon the appellant's only defense, alibi, and it is easy to see what affect this error could have had upon the jury. In Meadows v. United States, 82 F. 2d. 881, 65 App. D.C. 275, (1936), the court stated:

> "If plain error vital to the defendant has been committed, it may be noticed and corrected on appeal, notwithstanding absence of objection and exception (Rules of Practice and Procedure in Criminal Cases, rule 9, 28 U.S.C.A. following section 723a; Supreme Court Rules, rule 8, 28 U.S.C.A. following section 354)."

Since the jury had available no transcript of the testimony, if they believed the court's erroneous statement to the effect that Summerlin's defense was that he was visiting his brother, they would have been further confused by the remainder of the paragraph which reads as follows:

> "And the other witnesses for him, his brother, -- well, his wife said that when she left, he was still there. And he said that he was in bed at the time this robbery occurred. And that is what is called "alibi". "Alibi" simply means that, "I didn't do it, I was somewhere else." That is all that need be said about that."

Among the various possibilities, the jury might have interpreted the entire paragraph to mean that different witnesses had placed Summerlin himself either in bed at home, or in the alternative at his brother's place at the time of

the crime. Another possible interpretation within the four corners of this paragraph might be that his brother said he was visiting him at the time, whereas the defendant Summerlin himself and his wife testified that he was home in bed at the time. Moreover, if the incorrect statement of fact, "visiting his brother at the time" is placed in context with testimony that the jury actually heard from defense witnesses, the error makes the defendant's narrative appear to suggest that the white Ford convertible had been returned to brother Ansell, and that the defendant was also visiting his brother at the time, thereby untruthfully reuniting the defendant with the car which was suspected of having participated in the robbery get-away. This interpretation is opposite to the uncontroverted testimony to the effect that the defendant was not even in possession of the car at the time of the robbery.

It is unlikely that the jury would fail to believe the judge's erroneous statement of the alibi, or that the jury would assume that it was an inadvertent error. In Bollenbach v. United States, 326 U.S. 607, 612, (1946) the court said:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial

> for the purpose of assuring its proper conduct of the determining questions of law." Quercia v. United States, 289, U.S. 466, 469. "The influence of the trial judge on the jury is necessarily and properly of great weight," Starr v. United States 153, U.S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If if is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge."

Undoubtedly, there were other interpretations that could be given to the erroneous statement, or to the tendency of the instruction viewed as a whole to minimize the importance of the defendant's only defense. But, however interpreted, it is strongly urged that this error constituted "plain error", that it was prejudicial, that it possessed clear capacity to mislead the jury and therefore was prejudicial to a degree sufficient to have affected the results of the trial, wherefore the error amounts to reversible error of a type which will be reviewed by an Appeals Court whether or not an objection was taken during the course of the trial. Federal Rules of Criminal Procedure, Rule 52(b).

The second alleged error, failure to instruct as to the relative degrees to which the Government and the defense must

prove their cases, is vital error because of the likelihood that, without instruction, the jury would select one case or the other by a mere preponderance, not having been given any yardstick by which to judge the adequacy of the defense unless they used the "beyond a reasonable doubt" yardstick mentioned in connection with the Government's case. This is "plain error" capable of affecting the outcome of the case, and therefore reviewable by this court, in the absence of timely objection.

IV. Whether the conviction of carrying a pistol without a license under 22 D.C.C. §3204 can be sustained where the pistol was not recovered and no evidence indicated it was a real firearm.

Although it is understood that reversal on one count will not ordinarily affect the sentence on the other counts, since the sentences run concurrently, nevertheless, Counsel urges that the court consider whether or not there was any

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In connection with Point IV, testimony mentioning the pistol appears at (Tr. 24, 25, 56 and 601).

evidence at all in the case on which the jury could have found that D.C. Code 22-§3204 was violated since the pistol was never recovered at all and since there was no evidence to the effect that the pistol actually constituted a firearm, rather than a toy pistol, or an inoperative pistol. The only evidence appearing in the case at all concerning the pistol is found in the testimony of Ellis Levy (Tr. 24) where the witness testified that defendant was "carrying a nickleplated revolver"; again at (Tr. 25) where the witness testified that he was struck on the head with the pistol; and in the testimony of Sidney Levy who testified (Tr. 56) that the defendant pointed a revolver in his face.

Counsel raises the point concerning lack of evidence that it was a real firearm, since it is understood that §3204 of the D. C. Code is violated only by carrying a workable firearm.

If the conviction remains unchallenged, the defendant, if he were to be convicted again at some later date, would face a much larger mandatory penalty.

The Court of Appeals is therefore urged to reverse the conviction on the fifth count on the ground that there is no evidence from which the jury could have determined that a real firearm was used during the robbery.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and remanded to the District Court for a new trial.

Respectfully submitted,

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